

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANN McCACKEN; JOAN FARRELL;
SARAH STILSON; KEVIN McCLOSKEY;
CHRISTOPHER TRAPATSOS; and
KIMBERLY BAILEY, as individuals
and as representatives of the classes,

Case No.: 6:14-cv-06248-MAT-JWF

Plaintiffs,

vs.

VERISMA SYSTEMS, INC.;
UNIVERSITY OF ROCHESTER;
STRONG MEMORIAL HOSPITAL; and
HIGHLAND HOSPITAL,

Defendants.

WILLIAM G. KRIEGER REPLY TO ANNE M. EBERHARDT RESPONSE

I, William G. Krieger, hereby submit this Response Declaration in support of Plaintiffs' Motion for Class Certification.

Introduction

1. On October 31, 2016, I submitted a *Declaration in support of Plaintiffs' Motion for Class Certification* (the "Krieger Declaration"), which set forth, among other things, a preliminary analysis of:

- a. The methods by which Defendants historically have (or, in the absence of actual practice, alternatively could have) tracked and/or calculated the costs incurred to respond to requests for medical records from Plaintiffs and putative Class Members;
- b. Whether, and the extent to which, Plaintiffs and putative Class Members were overcharged by Defendants for copies of their medical records in violation of New York Public

Health Law § 18, by Defendants charging Plaintiffs and putative Class Members¹ amounts exceeding the lower of the actual costs to produce such records or seventy-five cents per page;² and

c. Whether class-wide damages can be readily determined from Defendants' records and other class-wide evidence.

2. On November 30, 2016, Anne M. Eberhardt of Gavin/Solomese submitted the *Anne M. Eberhardt Response to the October 31, 2016 Declaration of William G. Krieger* (the "Eberhardt Declaration"), which provided a limited response to certain analyses performed and conclusions reached by the Krieger Declaration. Specifically, the Eberhardt Declaration analyzed the Krieger Declaration's determination of Verisma's total cost per page to produce medical records, its calculation of the total costs incurred by Verisma (and URMC) to produce records, and its determination of the total number of pages that should be considered when calculating cost per page.

3. The purpose of this Response Declaration is to respond to the Eberhardt Declaration's assertions regarding: (a) the number of record request pages that should be used in calculating the cost per page; and (b) the consideration of certain indirect costs in calculating the cost per page.

4. While I fundamentally disagree with several other opinions outlined in the Eberhardt Declaration, I have not specifically addressed them in this Response Declaration as these issues are not relevant to class certification and are more appropriately addressed during the damages phase of the instant litigation.

¹ Either directly or through a "Qualified Person," as defined in New York Public Health Law §18(1)(g)-(h).

² New York Public Health Law §18(2)(e).

Record Request Pages Considered in Calculating the Cost per Page

5. The Krieger Declaration's preliminary analysis of damages calculated the cost per page by dividing the total costs incurred by Verisma to produce URMC medical records (the numerator) by the total number of pages of URMC records produced (the denominator), regardless of whether the pages were billable or courtesy (free) pages. This approach is based on standard cost accounting practice, and is consistent with Verisma personnel's testimony that there is no measurable difference in the cost required to fulfill billable and courtesy requests.³

6. The Eberhardt Declaration disputes the use of both billable and courtesy pages in the denominator of the total cost per page calculation. Specifically, and despite acknowledging that "there is no difference in the costs for supporting billable and non-billable pages,"⁴ the Eberhardt Declaration asserts that only billable pages should be included in the denominator, because "Verisma cannot recover costs on pages processed but not billed."⁵

7. In my opinion, the Eberhardt Declaration's opinion that the cost per page should be based solely only on billable pages (rather than all pages) fails for the following reasons:

The revenue billed for a page bears no relevance to the cost incurred to produce that page.

8. As noted in both the Krieger Declaration and the Eberhardt Declaration, the cost to produce a billable page and the cost to produce a courtesy page are identical. Despite this fact, the Eberhardt Declaration posits that the cost per page incurred by Verisma for requestors that Verisma determines should be charged for copies of their medical records, should be increased because other record requestors have received their copies for free. While such a decision invariably changes the revenue per page recovered by Verisma, it has no bearing on the cost per page that Verisma incurs to

³ Krieger Declaration, paragraph 21.

⁴ Eberhardt Declaration, paragraph 34 (emphasis added).

⁵ Eberhardt Declaration, paragraph 13.

produce the record. Any assertion to the contrary contradicts one of the most basic tenants of cost accounting: that cost per unit produced is determined by dividing costs incurred by the total number of units produced.

Calculating cost per page based only on billable pages requires that Plaintiffs and putative Class Members pay not only for their pages, but also for free pages provided to others.

9. According to the Eberhardt Declaration, the Plaintiffs and putative Class Members should (and would) be charged a rate per page that covers both the cost incurred to process their record request plus the cost incurred to process requests that the Defendants determined should be provided free of charge to other requestors. As a result, under the Eberhardt Declaration's approach, the cost that Plaintiffs and putative Class Members must bear to receive one page of their record must also cover the cost of an additional [redacted] pages of records provided to those requestors who receive their records for free.⁶ For example:

a. Under the Eberhardt Declaration's approach, Plaintiffs and putative Class Members would be charged \$[redacted] per page to cover Verisma's direct costs. As noted in the Krieger Declaration, Verisma's actual direct cost per page produced is \$[redacted] per page.⁷ By charging Plaintiffs and putative Class Members \$[redacted] per page for pages that cost Verisma \$[redacted] to produce, Verisma is requiring that Plaintiffs and putative Class Members pay [redacted] times Verisma's actual direct costs to produce these pages. This is equivalent to Verisma requiring the paying customer to pay for their page, plus an additional [redacted] pages provided to others for free:

⁶ Total pages processed (2012 through 2015), divided by billable pages processed (2012 through 2015) = [redacted] pages processed per billable page.

⁷ Krieger Declaration (page 13).

	2012	2013	2014	2015	Total
Eberhardt Calculation - Direct Cost/Charge to Plaintiffs (Eberhardt Declaration Paragraph 15)	\$ [REDACTED]				
Direct Costs per page - (Krieger Declaration Paragraph 21h)	\$ [REDACTED]				
Eberhardt - Per Page Multiple	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

b. Similarly, under the Eberhardt Declaration's approach, when both direct and allocated indirect costs are considered, Plaintiffs and putative Class Members would be charged \$ [REDACTED] per page, instead of the \$ [REDACTED] per page that Verisma actually incurred to produce these pages. Again, this is equivalent to the cost of [REDACTED] actual pages produced:

	2012	2013	2014	2015	Total
Eberhardt Calculation - Direct & Allocated Department Cost/Charge to Plaintiffs (Eberhardt Declaration Paragraph 16)	\$ [REDACTED]				
Direct Costs and Allocated Department Costs per page - (Krieger Declaration Paragraph 21j)	\$ [REDACTED]				
Eberhardt - Per Page Multiple	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

10. In my opinion, the Eberhardt Declaration's assertion that courtesy pages should be excluded from the calculation of cost per page does not logically comport with standard cost accounting practice, and would result in revenue generated from Plaintiffs' and putative Class Members' requests subsidizing Verisma and URMC's costs to produce records for requestors who receive their requests for free.

Consideration of Certain Indirect Costs in Calculating Cost per Page

11. As noted in the Krieger Declaration, in the ordinary course of business, Verisma

[REDACTED]⁸ As further noted in the Krieger Declaration, while Verisma incurs additional expenses that are not directly attributable to specific customers (and as such are not allocated to customer-specific activities)⁹, [REDACTED]

[REDACTED]. As a result, I also did not include these costs when calculating Verisma's cost per page. However, as indicated in the Krieger Declaration, in the event that these unallocated indirect costs were included in my cost analysis, the total costs per page would still be far below \$0.75 per page.¹⁰

12. The Eberhardt Declaration has prepared alternative calculations of cost per page considering differing amounts of indirect costs, including: (a) All indirect costs, (b) All indirect costs less sales, and (c) R&D and client service indirect costs only. The amount of indirect cost varies significantly depending on the elements of indirect costs included in the calculation, as illustrated in the table below:¹¹

	<i>Source:</i> Eberhardt Table 3 - Indirect Costs				
	2012	2013	2014	2015	Total
Alternative 1 - All Indirect Costs	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Alternative 2 - Indirect Costs less Sales Costs	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Alternative 3 - R&D and Client Service Indirect Costs Only	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]

13. Recognizing that each of these indirect cost alternatives considers costs not directly attributable to Verisma's provision of patient records, the Eberhardt Declaration presents three different approaches for allocating these indirect expenses to Verisma's patient records: (a) allocation on the same basis that direct department costs were allocated; (b) allocation based on the number of pages that Verisma processed for URMC (as a percentage of the total pages Verisma processed for all

⁸ Krieger Declaration, paragraph 21(i).

⁹ Krieger Declaration, paragraph 22.

¹⁰ Krieger Declaration, paragraph 22.

¹¹ Eberhardt Declaration, paragraph 27 and Table 3.

customers); and (c) allocation based on the number of billable pages that Verisma processed for URMC (as a percentage of the total billable pages that Verisma processed for all customers).¹² These alternative allocation methods result in Verisma allocating [REDACTED]¹³ percent, [REDACTED]¹⁴ percent, and [REDACTED]¹⁵ percent of applicable indirect costs, respectively, to URMC record requests.

14. Although I do not agree that all indirect costs should be included in determining the total cost per page, I have nonetheless prepared a preliminary calculation of the total cost per page using all indirect expenses (the Eberhardt Declaration's most inclusive category of indirect costs), and allocating these costs based on the percentage of URMC pages to the total pages that Verisma processed for all customers (the Eberhardt Declaration's highest proposed allocation percentage). The table below summarizes the results of my preliminary calculation of the indirect cost per page on an annual basis from 2012 through 2015:

	2012	2013	2014	2015	Total
Total URMC Pages Processed	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total Verisma Pages Processed	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
URMC Pages Processed as a Percentage of Total Verisma Pages Processed	[REDACTED] %				
URMC Pages Processed as a Percentage of Total Verisma Pages Processed	[REDACTED] %				
Total All Indirect Costs	\$ [REDACTED]				
Indirect Costs Allocated to URMC	\$ [REDACTED]				
Indirect Costs Allocated to URMC	\$ [REDACTED]				
Total URMC Pages Processed	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Indirect Costs per page allocated to URMC	\$ [REDACTED]				

15. Using these calculated indirect costs per page, I then determined the total cost per page incurred by Verisma to process record requests on behalf of URMC during each year from 2012 through 2015. The table below summarizes the total cost per page (including direct costs, allocated

¹² Eberhardt Declaration, paragraphs 28 and 30.

¹³ Eberhardt Declaration, Table 4.

¹⁴ Eberhardt Declaration, Table 5.

¹⁵ Eberhardt Declaration, Table 5.

departmental costs, and allocated corporate indirect costs) calculated on a yearly basis from 2012 through 2015:

	2012	2013	2014	2015	Total
Direct Costs per page	\$ [REDACTED]				
Allocated Specific Department Costs	\$ [REDACTED]				
Direct Costs and Allocated Specific Department Costs per page	\$ [REDACTED]				
Other Indirect Costs Allocated to URMC per page	\$ [REDACTED]				
Total Cost Per Page	\$ [REDACTED]				

16. Even after considering the most generous attribution of indirect costs to URMC activity, my preliminary analysis indicates that the total costs per page incurred by Verisma to fulfill URMC record requests was still significantly lower than the \$ [REDACTED] per page charged by Verisma.

Summary Conclusions

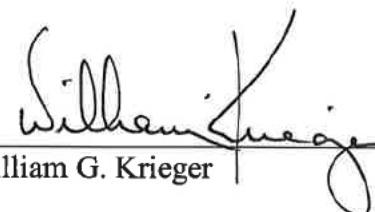
17. In my opinion, based upon my analysis, using the information provided to date, and as stated to a reasonable degree of professional and accounting certainty:

a. Consistent with standard cost accounting principles, any calculation of Verisma's costs incurred per page, should consider all pages produced for that cost (including both billable and courtesy pages). Any calculation using only billable pages would result in Plaintiffs and putative Class Members subsidizing the costs incurred by Verisma and URMC to fulfill free record requests.

b. Even after considering (1) the costs directly attributable to URMC, (2) the indirect costs Verisma allocated to URMC from Verisma's Review, Distribution, IT, and Customer Service departments, and (3) the maximum Verisma indirect costs allocated to URMC, the total cost per page incurred by Verisma to fulfill URMC record requests during each year from 2012 through 2015 was substantially below \$0.75 per page.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2016, in Pittsburgh, Pennsylvania



William G. Krieger